

STATE OF MICHIGAN  
COURT OF APPEALS

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PATRICK KORTH,

Plaintiff-Appellant,

v

EFFICIENT AND RELIABLE OF MICHIGAN,  
INC., d/b/a CO/OP OPTICAL, and KENNETH  
MORRIS,

Defendants-Appellees.

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UNPUBLISHED

August 8, 2006

No. 268147

Wayne Circuit Court

LC No. 04-428393-CL

Before: Davis, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendants. We affirm.

This case arises out of plaintiff's July 29, 2003, termination from his position as the executive vice-president of defendant Co/Op Optical ("Co/Op"). Defendant Kenneth Morris was the Chairman of the Board at Co/Op. Two days previously, he had stepped down as Chief Executive Officer and President of Co/Op, at which time the Board appointed Jacqueline Smith to the CEO and President positions. Plaintiff contends that his termination was wrongful and engineered by Morris out of personal animosity. In 2001, plaintiff refused to participate in cashing out a deferred compensation plan to Morris, allegedly out of concern that doing so would violate applicable federal taxation laws. Defendants contend that plaintiff was terminated because of his disrespectful and antagonistic attitude toward Smith, formerly a subordinate of plaintiff, in her new position as CEO and President. Plaintiff commenced this two-count suit, alleging discharge in violation of public policy and tortious interference with a legitimate business relationship. The parties engaged in discovery. After oral arguments on defendants' motion for summary disposition, the trial court found plaintiff's claims based on "a lot of speculation" and no factual support. Plaintiff contends on appeal that there were genuine issues of material fact as to his wrongful discharge claim, and the trial court erred in dismissing his tortious interference claim when defendant's motion had not addressed that count.

A grant or denial of summary disposition is reviewed de novo on the basis of the entire record to determine if the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). When reviewing a motion under MCR 2.116(C)(10), which tests the factual sufficiency of the complaint, this Court considers all

evidence submitted by the parties in the light most favorable to the non-moving party and grants summary disposition only where the evidence fails to establish a genuine issue regarding any material fact, although “the mere possibility that the claim might be supported by evidence produced at trial” is insufficient. *Id.*, 120-121. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v GMC*, 469 Mich 177, 183; 665 NW2d 468 (2003). If the nonmoving party would bear the burden of proof at trial, he must present documentary evidence establishing the genuine existence of a material factual dispute. *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004).

We first address plaintiff’s argument that the trial court erred finding no genuine issue of material fact and therefore dismissing his claim that he was wrongfully discharged in violation of public policy. In the absence of a contract holding to the contrary, at-will employment is usually terminable by the employer or the employee at any time, for any or no reason whatsoever. *Suchodolski v Michigan Consolidated Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). However, under certain circumstances, public policy considerations will make termination of even at-will employment actionable by the terminated employee. *Id.*, 695. Plaintiff invokes one of those circumstances here: “where the alleged reason for the discharge of the employee was the failure or refusal to violate a law in the course of employment.” *Id.*

Plaintiff specifically argues that his discharge came about because Morris had an underlying and long-standing animosity toward him stemming from a dispute over a deferred compensation plan that was established for Morris in January of 1994. Plaintiff, who was CEO at the time, drafted the deferred compensation plan contract, which stated that the funds would not be separated from Co/Op’s general funds and that Morris was not entitled to interest on the principle amount. In 1995, Morris began directing Debora Matthews, Co/Op’s Chief Financial Officer, to invest the funds in the stock market. In 2000, Morris sought to cash out the plan or at least remove the funds from the stock market. At some point, plaintiff told Morris that “this is [Co/Op] money you cannot do that,” but Morris continued to deal directly with Matthews. Matthews was concerned that Morris misunderstood the terms of the contract and discussed the matter with plaintiff. Morris believed that the terms of the contract entitled him to the principle and interest, and he did not recall agreeing to forgo the interest. The Co/Op board of directors eventually resolved the issue by giving Morris a compromise that would give Morris 79% of the funds while allowing Co/Op to avoid violating IRS regulations governing constructive receipt and deferred compensation plans. Morris remained upset and of the opinion that plaintiff had attempted to cheat him.

Therefore, plaintiff argues, Morris engineered Smith’s appointment as CEO and President, despite Smith’s alleged lack of qualifications for the role, in order to effectuate plaintiff’s termination. Despite his occupancy of the position Smith ascended to just before she terminated plaintiff, Morris apparently could not accomplish plaintiff’s termination on his own. Defendant contends that Smith terminated plaintiff for insubordination. Presuming that Morris did in fact orchestrate plaintiff’s termination in retaliation for plaintiff’s handling of the deferred compensation plan dispute, it remains incumbent upon plaintiff to show that he refused to violate the law and that his refusal to violate the law was the reason for his termination. We agree with the trial court that plaintiff has failed to do so here.

When the record is viewed in the light most favorable to plaintiff, it appears that reasonable minds could conclude Morris indeed bore considerable personal animosity toward plaintiff and that his animosity stemmed from plaintiff's handling of the deferred compensation plan. It also appears that reasonable minds could conclude plaintiff was concerned about the potential tax consequences that would befall Co/Op if Morris' plans for the deferred compensation plan funds were executed. However, there is no evidence that Morris was aware of any possible tax law violation or that he was attempting to avoid the payment of taxes on the income. There is likewise no evidence that, when Morris sought payment of the aggregate funds, he intended or directed plaintiff to avoid payment of the necessary taxes. The evidence instead shows that Morris believed the deferred compensation plan contract permitted him to use the funds in ways it actually did not permit. The evidence also shows that Morris intended to bear responsibility for signing a contract he misunderstood, and his animosity toward plaintiff stemmed from a belief that plaintiff intentionally deceived him as to what the contract permitted. Finally, although the evidence reflects concern by plaintiff and by Matthews for the tax consequences of Morris' desired use of the funds, the evidence shows a concern for Co/Op's tax liability and Morris' misunderstanding, not a concern for a violation of IRS regulations.

Therefore, based on the record, it is mere speculation to further infer that Morris intended or directed plaintiff to violate IRS regulations. Here, the facts that Morris was interested in gaining as much money as possible, and that he was angry with plaintiff, do not point to the particular conclusion that Morris expected plaintiff to violate IRS regulations. For these reasons, plaintiff cannot support his overall claim that his discharge was caused by Morris's purported retaliation for plaintiff's refusal to violate them, regardless of whether Morris may be said to have influenced the decision to discharge plaintiff.

We then turn to plaintiff's argument that the trial court improperly dismissed his tort claim against Morris for intentional interference with a business relationship or expectancy. The elements of this tort are: (1) the existence of a valid relationship or expectancy, (2) knowledge of the relationship or expectancy on the part of the interferer, (3) an intentional interference inducing termination of the relationship or expectancy, and (4) damage to the plaintiff. *Health Call of Detroit v Atrium Home and Health Care*, 268 Mich App 83, 90; 706 NW2d 843 (2005). A plaintiff must allege "the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the . . . business relationship of another." *Badiee v Brighton Area Schools*, 265 Mich App 343, 367; 695 NW2d 521 (2005) (quoted citations omitted). Even an at-will employee may have an actionable expectation in "a subsisting relationship that is of value to the employee and will presumably continue in effect absent wrongful interference by a third party." *Feaheny v Caldwell*, 175 Mich App 291, 303; 437 NW2d 358 (1989); see also *Health Call*, *supra* at 90, 92.

Plaintiff specifically argues that the trial court erred when it dismissed this count at the motion hearing without articulating its reasoning, given that defendants allegedly failed to "specifically identify the issues as to which the moving party believes there is no genuine issue as to any material fact," MCR 2.116(G)(4), and failed to support the motion with documentary evidence, MCR 2.116(G)(3)(b). See *Meyer v Center Line*, 242 Mich App 560, 575; 619 NW2d 182 (2000). We disagree.

Defendants in their motion for summary disposition did not explicitly divide their arguments based on plaintiff's two claims. However, they requested dismissal of plaintiff's

entire complaint, and they addressed plaintiff's lack of evidence that Morris arranged, or even had any involvement in, plaintiff's termination. Defendants argued that Smith was solely responsible for plaintiff's discharge and that plaintiff merely speculated that Morris was involved. Plaintiff responded that dismissal of the tortious interference count was improper because defendant had not specifically addressed the count, but plaintiff also argued that the tortious interference claim was supported by the record. The motion hearing focused on the public policy claim, but defendants argued that the tortious interference count should also be dismissed because Morris could not have interfered with anything where there was no evidence he was involved in any way. Defendants identified the underlying issues with regard to which they believed there were no genuine issues of material fact, and they addressed plaintiff's lack of documentary evidence to support the issues. Defendants also explicitly requested dismissal of both counts. Defendants did not waive the issue by focusing their arguments on the public policy claim or by failing to partition their summary disposition brief into separate arguments for each count. Accordingly, the trial court was not precluded from rendering a decision on both counts. Furthermore, the dismissal of plaintiff's tortious interference claim was correct.

Smith discharged plaintiff the day after her appointment, after an executive staff meeting during which plaintiff told her that he thought her appointment was a mistake and that she lacked the necessary qualifications. Smith consulted another board member, Marc Stepp, who suggested giving plaintiff a second chance but agreed that discharge would be appropriate if plaintiff did not recant. Smith then came to plaintiff's office with Morris and discharged him on the grounds that he was not a team player and she did not trust him. Plaintiff contends that Morris caused this discharge after a "series of retaliatory acts," including rescinding plaintiff's CEO title and recommending Smith as his successor. Clearly, Morris favored Smith, distrusted plaintiff, and supported Smith's decision to discharge plaintiff. However, Morris's open attempts to reorganize Co/Op for personal or political reasons are largely irrelevant to plaintiff's tortious interference claim.

A defendant must be a third party to the employment relationship for his conduct to be actionable. *Dzierwa v Michigan Oil Co*, 152 Mich App 281, 287; 393 NW2d 610 (1986). The parties apparently agree that Morris remained in total effective control of Co/Op's management, and even had the authority to terminate plaintiff himself, when he demoted plaintiff and later orchestrated Smith's promotion. If Morris had authority to hire, evaluate, and terminate plaintiff, he would not be a third party, analogous to the situation in *Dzierwa*, *supra* at 287, where the president of the defendant corporation could not be a third party. However, there is evidence that the board of directors retained some degree of oversight of Morris's decisions. If Morris was an agent of Co/Op, he could be a third party if plaintiff can show that Morris "act[ed] to further strictly personal motives." *Feaheny*, *supra* at 305. Plaintiff bears a "particularly heavy burden of proving that the [agent] was acting outside the scope of [his] authority." *Coleman-Nichols v Tixon Corp*, 203 Mich App 645, 657; 513 NW2d 441 (1994). Such a claim requires "proof, with specificity, of affirmative acts by the defendant . . . which corroborated the unlawful purpose of the interference." *Id.*, quoting *Feaheny*, *supra* at 305.

There is no authority for the position that Morris' animosity was anything more than internal politics, which does not constitute malicious interference with plaintiff's relationship with the remaining board members. There is no evidence, for instance, that Morris – as an intermediary between plaintiff and the board – lied about plaintiff's abilities or falsified

performance records, as was alleged but not proved in *Feaheny*, *supra* at 306. Even if Morris' animus and possible lack of desire to continue working with plaintiff affected the board's decision, such an effect does not constitute unlawful *interference*. Smith met briefly with Morris after speaking to Stepp and before discharging plaintiff, but Smith and Morris both testified that she did not ask his advice and he did not give any. The mere timing of the meeting is not proof of an affirmative act showing wrongful interference. See *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 384-385; 689 NW2d 145 (2004) (noting that temporal proximity between a protected act and an adverse employment action is insufficient by itself to show causation). Here, the record amply supports Smith's proffered and reasonable grounds for discharging plaintiff, unlike *Patillo v Equitable Life Assurance Society of US*, 199 Mich App 450, 458; 502 NW2d 696 (1992), where there was no actual evidence of insubordination. The mere timing of Morris's and Smith's meeting allows for nothing more than speculation that Morris wrongfully influenced Smith during their brief meeting. The trial court's dismissal on the grounds that plaintiff had provided speculation instead of proof was correct.

Affirmed.

/s/ Alton T. Davis  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello